

# **CITY OF BURIEN, WASHINGTON**

## **ORDINANCE NO. 578**

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### **AN ORDINANCE OF THE CITY OF BURIEN, WASHINGTON, GRANTING A NON-EXCLUSIVE FRANCHISE TO ZAYO GROUP, LLC, TO INSTALL, OPERATE AND MAINTAIN FIBER OPTIC CABLES IN PUBLIC RIGHTS OF WAY OF THE CITY OF BURIEN AND SETTING FORTH TERMS AND CONDITIONS OF THE FRANCHISE**

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WHEREAS, the City of Burien (“City”) is authorized by applicable law to grant one or more nonexclusive franchises to construct, operate, and maintain fiber optic cables within the boundaries of the City; and

WHEREAS, Zayo Group, LLC, a limited liability company organized and existing under the laws of the State of Delaware (“Franchisee”) is a competitive telecommunications company providing telecommunication services, which desires to occupy City rights-of-ways to install, construct, operate, and maintain its telecommunications facilities and network for the purpose of providing services to its customers at locations within the City; and

WHEREAS, Franchisee has applied to the City for a non-exclusive franchise to enter, occupy, and use City rights-of-way to construct, install, operate, maintain, and repair fiber optic facilities to offer and provide telecommunications service for hire, sale, or resale in the City of Burien; and

WHEREAS, the Federal Communications Act of 1934, as amended by the 1996 Telecommunications Act relating to telecommunications providers, recognizes and provides local government authority to manage the public rights-of-way and to require fair and reasonable compensation on a competitively neutral and nondiscriminatory basis; and

WHEREAS, a franchise does not include, and is not a substitute for any other permit, agreement, or other authorization required by the City, including without limitation, permits required in connection with construction activities in City rights-of-way, which must be administratively approved by the City after review of specific plans; and

WHEREAS, Franchisee shall be responsible for its actual costs in using, occupying and repairing City rights-of-way; and

WHEREAS, the City and Franchisee desire to effectuate good coordination of the use of the rights-of-way; and

WHEREAS, the public has had adequate notice and opportunity to comment on this franchise during a public proceeding; and

WHEREAS, the City Council finds that the franchise terms and conditions contained in this Ordinance are in the public interest.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF BURIEN, WASHINGTON, DOES ORDAIN AS FOLLOWS:

**Section 1. Definitions.** For the purposes of this Ordinance, the following terms, phrases, words, and their derivations will have the meanings given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural include the singular, and words in the singular include the plural. Words not defined will have the meaning ascribed to those words in the Burien Municipal Code (“BMC”) or in the Federal Communications Act of 1934 as amended, unless inconsistent herewith.

“Affiliate” means any Person who owns or controls, is owned by or controlled by, or is under common ownership or control with Franchisee.

"Cable Service" means the one-way transmission to subscribers of video programming or other programming service and subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

“City” means the City of Burien.

“City Council” means the governing legislative body of the City.

"Conduit" means optical cable housing, jackets, or casing, and pipes, tubes, or tiles used for receiving and protecting wires, lines, cables, and communication and signal lines.

"Costs" means costs, expenses, and other financial obligations of any kind whatsoever.

"Dark Fiber" means properly functioning optical cable, which is not used or available for use by Franchisee or the general public.

“Effective Date” means five days following the publication of this Franchise or a summary thereof occurs in an official newspaper of the City as provided by law.

“Facilities” means, collectively, any and all telecommunications transmission systems and appurtenances owned by Franchisee, now and in the future, in the Franchise Area, including, but not limited to, wire, radio, optical cable, electromagnetic or other similar types of equipment, and related appurtenances, in any way comprising part of the System.

“FCC” means the Federal Communications Commission or its designated representative.

“Franchise Area” means the area within the jurisdictional boundaries of the City, including annexed area, to be served by Franchisee as specified in this Franchise.

"Incremental Costs" means the actual and necessary costs incurred, which exceed costs that would have otherwise been incurred. Incremental costs shall not include any part, portion, or proration of costs, of any kind whatsoever, including without limitation overhead or labor costs that would have otherwise been incurred.

"Optical Cable" means wires, lines, cables and communication and signal lines used to convey communications by fiber optics.

“Person” means any individual, firm, partnership, association, corporation, company, or organization of any kind.

"Public Way" or “Right-of-Way” means any highway, street, road, sidewalk, alley, or other public right of way or public utility easement under the jurisdiction and control of the City, which has been acquired, established, dedicated, or devoted to such purposes.

“Telecommunications” means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.

“Telecommunications Applications Fees and Charges” means fees and charges related to right-of-way management, construction permit, permit design fee, building permit, encroachment permit, inspections, and pavement restoration.

“Telecommunications Service” means the offering of telecommunications for a fee directly to the public or to such classes of users as to be effectively available directly to the public, regardless of the Facilities used.

“Telecommunications System” or “System” means only those Facilities necessary for Franchisee to provide Telecommunications Service.

"Underground Facilities" means Facilities located under the surface of the ground, other than underground foundations or supports for overhead Facilities.

"Utility Poles" means poles, and crossarms, devices, and attachments directly affixed to such poles, which are used for the transmission and distribution of electrical energy, signals, or other methods of communication.

## **Section 2. Franchise - Grant and Authorization.**

- A. The City grants to Franchisee, subject to the terms and conditions of this Franchise, a non-exclusive franchise to enter, occupy, and use Public Ways for constructing, installing, operating, maintaining, repairing, and removing Telecommunications Facilities necessary to provide Telecommunications Services. Franchisee shall construct, install, operate, maintain, repair, and remove its Facilities at its expense, except as expressly provided otherwise in this Franchise, and in accordance with the Burien Municipal Code, including but not limited to the right-of-way use provisions and permitting requirements of Title 12 BMC.
- B. Nothing in this Franchise grants authority to Franchisee to enter, occupy, or use City property.
- C. Any rights, privileges, and authority granted to Franchisee under this Franchise are subject to the legitimate rights of the police power of the City to adopt and enforce general ordinances necessary to protect the safety and welfare of the public, and nothing in this Franchise excuses Franchisee from its obligation to comply with all applicable general laws enacted by the City pursuant to such power. Any conflict between the terms or conditions of this Franchise and any other present or future exercise of the City's police powers will be resolved in favor of the exercise of the City's police power.
- D. Nothing in this Franchise excuses Franchisee of its obligation to identify its Facilities and proposed Facilities and their location or proposed location in the Public Ways and to obtain use and/or development authorization and permits from the City before entering, occupying, or using Public Ways to construct, install, operate, maintain, repair, or remove such Facilities.
- E. Nothing in this Franchise excuses Franchisee of its obligation to comply with applicable codes, rules, regulations, and standards, subject to verification by the City of such compliance.
- F. Nothing in this Franchise shall be construed to limit taxing authority or other lawful authority to impose charges or fees, or to excuse Franchisee of any obligation to pay lawfully imposed charges or fees.
- G. Nothing in this Franchise grants authority to Franchisee to impair or damage any City property, Public Way, other ways or other property, whether publicly or privately owned.
- H. Nothing in this Franchise shall be construed to create a duty upon the City to be responsible for construction of Facilities or to modify Public Ways to accommodate Franchisee's Facilities.

- I. Nothing in this Franchise grants authority to Franchisee to provide or offer Cable Service or Internet Protocol Television (“IPTV”) Service.
- J. Franchisee may use the wired Facilities authorized by this Franchise for the transmission of Telecommunications Service only as expressly provided in this Franchise.
- K. Nothing in this Franchise shall be construed to create, expand, or extend any liability of the City to any third party user of Franchisee's Facilities or to otherwise recognize or create third party beneficiaries to this Franchise.
- L. Nothing in this Franchise shall be construed to permit Franchisee to unlawfully enter or construct improvements upon the property or premises of another.

**Section 3. Term.** Authorization granted under this Franchise shall be for a period of five (5) years from the effective date of this Franchise. This shall be referred to as the primary term. The Franchise will automatically renew for one successive period of five (5) years unless cancelled at the end of the primary term by either party by written notice to the other party no less than 180 calendar days prior to the end of the primary term.

**Section 4. Location, Colocation, and Relocation of Facilities.**

- A. Franchisee must place its Facilities underground except as otherwise expressly provided herein or in the Burien Municipal Code. Subject to the terms and conditions of this Franchise and the Burien Municipal Code, Franchisee may place optical cable, optical cable housing, and splicing connections on existing utility poles as overhead Facilities, if approved by the owner of the utility poles and if approved by the City. All other Facilities, including, without limitation, Facilities required to operate or maintain such optical cable, optical cable housing, and splicing connections must be underground Facilities if they are located in a Public Way, provided that this requirement shall not apply to Facilities excepted by BMC 12.40.040.
- B. Franchisee's Facilities shall not interfere with the use of Public Ways or City property by the City, the general public, or other persons authorized to enter, occupy, or use Public Ways or City property. Whenever new Facilities will exhaust the capacity of a Public Way to reasonably accommodate future users or Facilities, the Franchisee shall provide nondiscriminatory access to its Facilities to future users and facilities. However, Franchisee shall not permit installations by others in the Franchise Area without written approval of the City, which approval shall not be in lieu of a franchise or other requirements of the City and shall not abrogate Franchisee’s responsibility for compliance with this Franchise by third party users of the Telecommunications System.
- C. Franchisee shall not impair or damage any City property, Public Way, other ways, or other property, whether publicly or privately owned.

- D. Franchisee shall provide the City with information in such form requested by the City, which accurately reflects the horizontal and vertical location and configuration of all of Franchisee's Facilities. Franchisee shall provide the City with updated information annually or upon request by the City.
- E. Franchisee shall relocate its Facilities at the request of the City, whenever there is construction, alteration, repair or improvement of a Public Way. Franchisee shall complete the relocation by the date specified by the City, unless the City in its sole discretion establishes a later date for completion, after a showing by Franchisee that the relocation cannot be completed by the dates specified using best efforts and meeting safety and service requirements. Franchisee shall relocate its Facilities at its expense when such relocation is necessary for the benefit of the general public, but when such relocation is primarily for the benefit of a private party or parties, Franchisee shall be reimbursed by the private party or parties in accordance with RCW 35.99.060.
- F. Franchisee shall relocate its Facilities at its expense at the request of the City in the event of an unforeseen emergency that creates an immediate threat to the public safety, health or welfare.
- G. Franchisee shall install its Facilities in alleys rather than streets, wherever economically reasonable and technically feasible, unless otherwise authorized by the Public Works Director.
- H. Franchisee shall comply with all City codes and requirements, including but not limited to those regarding historic districts.
- I. Prior to installation, alteration or maintenance of its Facilities in the Public Way, Franchisee shall provide the City with a work schedule, estimated cost of such work, and a map showing the location of the Facilities. Upon completion of the work, Franchisee shall provide the City with as-built maps showing the final location of the Facilities. If requested, Franchisee shall also provide the City an electronic format of aerial and underground Facilities in relation to the Right-of-Way centerline to enable the City to add this information to the City's GIS program.

**Section 5. Poles, Conduit, Structures, and Property Owned by Others.** Franchisee shall obtain written approval from the owners of utility poles, conduit, structures, and property not owned by Franchisee, prior to attaching to or otherwise using such poles, conduit, structures or property, and shall provide proof of such approval to the satisfaction of the City. Where the City owns the utility poles, conduit, or structures, the Franchisee shall comply with City Code provisions as required for a specific project plan and permit submittal and shall enter into a separate lease agreement with the City. The City makes no representation and assumes no responsibility for the availability of utility poles, structures, and property owned by third parties

for the installation of Franchisee's Facilities. The City shall not be liable for the unavailability of utility poles, structures, and property owned by the City or third parties for any reason whatsoever. The installation of Facilities by Franchisee on or in the poles, structures, or property owned by others shall be subject to and limited by the owner's authority to enter, occupy, and use Public Ways. In the event that the authority of the owner of poles, structures, or property to enter, occupy, and use the Public Ways either expires, terminates, or is cancelled, the authority of Franchisee to construct, install, operate, maintain, and repair Franchisee's Facilities at such locations may be immediately cancelled at the sole option of the City. The City shall not be liable for the costs of removal of Facilities arising from expiration, termination, or cancellation of any pole owner's authority to enter, occupy, or use Public Ways for any reason whatsoever.

#### **Section 6. Construction and Installation Requirements.**

- A. The technical performance of the Facilities must meet or exceed all applicable technical standards authorized or required by applicable law, regardless of the transmission technology utilized. The City shall have the full authority permitted by applicable law to enforce compliance with such technical standards.
- B. All Facilities shall be installed in accordance with the best engineering, quality, and construction practices and standards of the telecommunications industry.
- C. All Facilities shall be constructed and installed in such manner and at such points so as not to inconvenience City or public use of the Public Ways or to adversely affect the public health, safety or welfare and in conformity with plans approved by the City, except in instances in which deviation may be allowed by the City.
- D. Franchisee's installations and operations shall conform to all federal, state, local, and industry codes, rules, regulations, standards and laws. Franchisee must cease work immediately, if the City determines that Franchisee is not in compliance with such codes, rules, regulations, or standards, and may not begin or resume work until the City determines that Franchisee is in compliance. The City shall not be liable for any costs arising out of delays occurring as a result of such work stoppage.
- E. The Telecommunications System constructed, maintained and operated pursuant to this Franchise shall be so constructed, maintained and operated in accordance with all applicable engineering codes adopted or approved by the City, State of Washington, federal government, and/or engineering profession and in accordance with any applicable statutes of the State of Washington, rules and regulations of the applicable Washington regulatory authority, ordinances of the City, or regulations of any other governmental regulatory commission, board or agency having jurisdiction over Franchisee.
- F. Franchisee shall have the sole responsibility for obtaining, at its own cost and expense, all permits, licenses, or other forms of approval or authorization necessary to construct,

operate, maintain or repair or expand the System, and to construct, maintain and repair any part thereof, including right-of-way use permits under Title 12 BMC.

- G. Franchisee or its designee shall give prior written notice and shall obtain approval from the City for all tree trimming work as provided in Title 12 BMC. The City agrees to either approve of Franchisee's request or to meet with Franchisee to review the proposed tree trimming within 2 business days of the receipt of Franchisee's written notice. Franchisee takes full responsibility for removing debris when the work is complete. All tree trimming is to be done at the sole expense and responsibility of Franchisee. Franchisee is solely responsible for property or tree damage caused by it and must fully restore any such property or tree damage when so requested by the City. In an emergency, Franchisee or its designee shall have the right to trim trees without prior approval from the City.

Trimming of trees and shrubbery within or overhanging the Public Ways to prevent contact with Franchisee's Facilities shall be done in such a manner to cause the minimum amount of damage to trees and shrubs. If trees or shrubbery are excessively damaged as a result of the work undertaken by or on behalf of Franchisee, Franchisee shall submit to the City its plan to preserve the trees or shrubbery or to remove and replace the trees or shrubbery with landscaping of equal value or to pay the City the value of the trees or shrubbery prior to the damage or removal, as determined acceptable by the Public Works Director or other authorized agent of the City. Any trimming or removal of trees or shrubs shall be done in full compliance with the City's ordinances and all other laws or regulations of the City.

- H. Neither approval of plans by the City nor any action or inaction by the City shall relieve Franchisee of any duty, obligation, or responsibility for the design, construction, and installation of its Facilities. Franchisee is solely responsible for the supervision, condition, and quality of the work done, whether it is performed by itself or by its contractors, agents, or assigns.
- I. Except as to emergency repairs, Franchisee shall, prior to excavating within any street, alley or other public place and installing any conduit, overhead cable or equipment therein, file with the Public Works Director plans and specifications thereof showing the work to be done, the location and nature of the installation to be made, repaired or maintained, and a schedule showing the times of beginning and completion and shall secure a permit from the City before proceeding with any such work. The Franchisee shall conform to all requirements of the City Code and regulations adopted pursuant thereto, as such requirements and regulations currently exist or may be amended.
- J. All construction and/or maintenance work as provided herein shall be performed in conformity with the plans and specifications filed with the City and with the permit or permits issued, except in instances in which deviation may be allowed thereafter in writing pursuant to an application by the Franchisee.

- K. Excavation work requiring permission from the City shall only commence upon the issuance of applicable permits by the City. However, in the event of an emergency requiring immediate action by Franchisee for the protection of the Facilities, City property, or other persons or property, Franchisee may proceed without first obtaining the normally required permits. In such event Franchisee must: (1) take all necessary and prudent steps to protect, support, and keep safe from harm the Facilities or any part thereof, City property, or other persons or property and to protect the public health, safety, and welfare; and (2) as soon as possible thereafter, must obtain the required permits and comply with any mitigation requirements or other conditions in the after-the-fact permit.
- L. Unless a condition or regulation is in conflict with a federal or state requirement, the City may condition the granting of any permit or other approval that is required under this Franchise, in any manner reasonably necessary for the safe use and management of the public right-of-way or the City's property, including, by way of example and not limitation, maintaining proper distance from other utilities, protecting the continuity of pedestrian and vehicular traffic, and protecting right-of-way improvements, private facilities, and public safety.
- M. Whenever necessary, after construction or maintenance of any of Franchisee's Facilities within the Right-of-Way, the Franchisee shall, without delay and at Franchisee's sole expense, remove all debris and restore the surface disturbed by Franchisee as nearly as possible to as good or better condition as it was in before the work began. Franchisee shall replace any property corner monuments, survey references, or equipment, which were disturbed or destroyed during Franchisee's work in the Right-of-Way. Such restoration shall be done in a manner consistent with applicable codes and laws and to the City's satisfaction and specifications.
- N. Franchisee shall provide the City GIS level maps showing the size and location of the Facilities within the Franchise Area in a format acceptable to the City, subject to the City's agreement to maintain the confidentiality of such information to the extent allowed by law. The City agrees that it will comply with applicable state law regarding public disclosure of Franchisee's maps and information and will withhold such disclosure from any third party to the extent allowed by law. Any map or information furnished to the City pursuant to this Franchise shall remain the Franchisee's proprietary information for all purposes to the extent allowed by law. Franchisee shall provide locates and field verify its Facilities at no cost to the City.
- O. Franchisee shall be solely and completely responsible for workplace safety and safe working practices on its job sites within the Franchise area, including safety of all persons and property during the performance of any work.

- P. Franchisee shall at all times keep up-to-date maps and records showing the location and sizes of all Franchisee Facilities installed by it in the Franchise Area. Such maps and records shall be kept in Franchisee's district operating office and shall be subject to inspection at all reasonable times by proper officials or agents of said City. Franchisee shall provide at the City's request a copy of Facilities maps for the City's use.
- Q. All of Franchisee's underground Facilities shall be installed in accordance with current City regulations and project permit requirements. Unless otherwise approved by the Public Works Director, underground Facilities must maintain ten (10) parallel feet of separation from water and sewer mains in accordance with the City's Road Design and Construction Standards. Franchisee shall restore the Public Way to pre-construction condition or better. Franchisee agrees to pay all costs and expenditures required on Rights-of-Way as a result of settling, subsidence, or any other need for repairs or maintenance resulting from excavations made by Franchisee for necessary trench patch maintenance until the next paving job. Favorable weather conditions permitting, Franchisee agrees to repair Rights-of-Way as a result of settling, subsidence, or other needed repairs or maintenance resulting from excavations made by the Franchisee upon forty-eight (48) hours notice excluding weekends and holidays. If Franchisee fails to undertake such repairs as herein provided, the City may perform the repairs at Franchisee's expense.
- R. Franchisee shall notify and provide documentation to the City in advance of any work in the Right-of-Way that involves excavation and/or street cuts. Design review is not required where trenching does not occur or for routine repair and maintenance.

**Section 7. Coordination of Construction and Installation Activities and Other Work.**

- A. Franchisee shall coordinate its construction and installation activities and other work with the City and other users of the Public Ways at least annually or as determined by the City.
- B. All construction or installation locations, activities and schedules shall be coordinated, as ordered by the City, to minimize public inconvenience, disruption or damages.
- C. Franchisee shall conduct its construction and installation activities at all times so as to maximize the life and usefulness of the paving and municipal infrastructure and to anticipate and avoid conflicts with the facilities of other users, occupants, utilities, franchisees, or permittees of the Public Ways.
- D. Franchisee shall make available and accept the colocation of property of others within trenches excavated or used by Franchisee in the Public Ways, provided the costs of the work are fairly allocated between the parties.
- E. By February 1 of each year, Franchisee shall provide the City with a schedule of its

proposed construction or installation activities and other work in, around, or that may affect the Public Ways or City property.

- F. The City shall give reasonable advance notice to Franchisee of plans to open Public Ways for construction or installation in locations where Franchise has Facilities; provided, however, the City shall not be liable for damages for failure to provide such notice. When such notice has been given, Franchisee shall provide information requested by the City regarding Franchisee's future plans for use of the Public Way to be opened. When notice has been given, Franchisee may only construct or install Facilities during such period that the City has opened the Public Way for construction or installation.

#### **Section 8. Temporary Removal, Adjustment, or Alteration of Facilities.**

- A. Franchisee shall temporarily remove, adjust, or alter the position of its Facilities at its cost at the request of the City for public projects, events, or other public operations or purposes.
- B. Whenever any Person has obtained permission from the City to use any Right-of-Way for the purpose of moving any building or other oversized structure, and upon 14 days written notice from the City or the permittee, provided the permittee shows sufficient evidence of a valid City permit, Franchisee shall raise or remove, at the expense of the permittee, any of Franchisee's Facilities that may obstruct the movement thereof, provided that the moving of such building or structure shall be done in accordance with the regulations and ordinances of the City.

#### **Section 9. Safety and Maintenance Requirements.**

- A. All work authorized and required under this Franchise shall be performed in a safe, thorough, and workmanlike manner.
- B. Franchisee, in accordance with applicable federal, state, and local safety requirements, shall at all times employ necessary care and shall use commonly accepted methods and devices for preventing failures and accidents that are likely to cause damage, injury, or nuisance to occur. All Facilities, wherever situated or located, shall at all times be kept in a good, safe, and suitable condition. If the City finds that Franchisee is responsible for a violation of a safety code or other applicable regulation, the City may, after discussion with Franchisee, establish a reasonable time for Franchisee to make necessary repairs. If the repairs are not made within the established time frame, the City may make the repairs itself at the cost of the Franchisee or have them made at the cost of Franchisee.
- C. If Franchisee fails to timely commence, pursue, or complete any work as required by law, permit, or this Franchise, the City may at its discretion cause the work to be done. Franchisee shall pay to the City the reasonable and documented actual costs of the work

in an itemized report provided by the City to Franchisee within 30 days after receipt of such report. In performing such work, the City shall not be liable to Franchisee for any damage.

- D. Franchisee or any Person acting on its behalf shall provide a traffic control plan that conforms to the latest edition of the Manual of Uniform Traffic Control Devices (MUTCD). Said plan shall use suitable barricades, flags, flaggers, lights, flares, and other measures as required for the safety of all members of the public during the performance of work in Public Ways, in order to prevent injury or damage to any person, vehicle, or property. Franchisee shall implement and comply with its approved traffic control plan during execution of its work. The traffic control plan shall be developed and kept on site in Franchisee's possession for all work impacting vehicular and pedestrian traffic.
- E. Franchisee shall maintain its Facilities in proper working order. Franchisee shall restore its Facilities to proper working order upon receipt of notice from the City that Facilities are not in proper working order. The City may, after discussion with Franchisee, establish a reasonable time for Franchisee to restore its Facilities to proper working order. If the Facilities are not restored to proper working order within the established time frame, the City may restore the Facilities to proper working order or have them restored at the cost of Franchisee.
- F. The City shall have the right to inspect all construction and installation work performed by Franchisee pursuant to this Franchise to the extent necessary to ensure compliance by Franchisee.
- G. The City reserves the right to install, and permit to be installed, sewer, electric, phone, gas, water and other pipelines, cables, conduits and related appurtenances and to do, or permit to be done, any underground or overhead work in, across, along, over or under a Public Way or other public place occupied by Franchisee. The City also reserves the right to construct new streets and public utilities and to alter the design of existing streets and public utilities. In performing such work, the City shall not be liable to Franchisee for any damage except to the extent of the City's negligence, but nothing herein shall relieve any other person or entity from the responsibility for damages to Franchisee's Facilities. The City will use its best efforts to provide Franchisee with reasonable advance notice of plans by other persons to open the Public Ways.
- H. On notice from the City that any work is being performed contrary to the provisions herein, or in an unsafe or dangerous manner, or in violation of the terms of any applicable permit, laws, regulations, ordinances or standards, the City may issue a stop work order and Franchisee shall stop the work immediately. The City shall issue a stop work order in writing, unless given verbally in the case of an emergency, and provide the order to the individual doing the work or post it on the work site. A copy of the order shall be sent to

Franchisee, and the order shall indicate the nature of the alleged violation or unsafe condition and the conditions under which Franchisee may resume work.

**Section 10. Removal of Unauthorized Facilities.** Within thirty (30) days following written notice from the City, Franchisee shall, at its expense, remove unauthorized Facilities and restore the Rights-of-Way and other property to as good a condition as existed prior to construction or installation of its Facilities. Any plan for removal of said Facilities must be approved by the City prior to such work. Facilities are unauthorized and subject to removal in the following circumstances:

- A. Upon expiration, termination, or cancellation of this Franchise;
- B. Upon abandonment of the Facilities, provided that Facilities shall be deemed abandoned if they are unused by Franchisee for a period of ninety (90) days;
- C. If the Facilities were constructed or installed prior to the effective date of this Franchise; unless such Facilities were constructed or installed upon the condition of subsequent approval of this Franchise with the consent of the City;
- D. If the Facilities were constructed, installed, operated, maintained, or repaired without the prior issuance of required use and/or development authorization and permits;
- E. If the Facilities were constructed or installed or are operated, maintained or repaired in violation of the terms or conditions of this Franchise; or
- F. If the Facilities are unauthorized for any reason whatsoever.

**Section 11. Discontinuing Use/Abandonment of Facilities.**

- A. The City may in its sole discretion allow Franchisee to abandon its Facilities in place, provided that no Facilities may be abandoned in place without the express written consent of the City. Upon consensual abandonment in place of Facilities, the Facilities shall become property of the City, and Franchisee shall submit to the City an instrument in writing, to be approved by the City, transferring to the City the ownership of such Facilities. The failure of Franchisee to submit an instrument shall not prevent, delay, or impair transfer of ownership to the City.
- B. Whenever Franchisee intends to discontinue using any Facility within the Rights-of-Way, Franchisee shall submit for the City's approval a complete description of the Facility and the date on which Franchisee intends to discontinue using the Facility. Franchisee may remove the Facility or request that the City permit it to remain in place. Notwithstanding Franchisee's request that any such Facility remain in place, the City may require Franchisee to remove the Facility from the Right-of-Way or modify the Facility to protect the public

health, welfare, safety, and convenience, or otherwise serve the public interest. The City may require Franchisee to perform a combination of modification and removal of the Facility. Franchisee shall complete such removal or modification in accordance with a schedule set by the City. Until such time as Franchisee removes or modifies the Facility as directed by the City, or until the rights to and responsibility for the Facility are accepted by another Person having authority to construct and maintain such Facility, Franchisee shall be responsible for all necessary repairs and relocations of the Facility, as well as maintenance of the Right-of-Way, in the same manner and degree as if the Facility were in active use, and Franchisee shall retain all liability for such Facility.

**Section 12. Restoration of Public Ways and Other Property.**

- A. When Franchisee, or any person acting on its behalf, does any work in or affecting any Public Way or other property, it shall, at its own expense, promptly remove any obstructions therefrom and restore, at Franchisee's cost, such ways and property to as good a condition as existed before the work was undertaken, unless otherwise directed by the City.
- B. If weather or other conditions do not permit the complete restoration required by this section, the Franchisee shall temporarily restore the affected Public Ways or property. Such temporary restoration shall be at the Franchisee's cost, and Franchisee shall promptly undertake and complete the required permanent restoration, when the weather or other conditions no longer prevent such permanent restoration.
- C. All restoration work is subject to inspection and final approval by the City. If restoration is not made to the satisfaction of the City within the established timeframe, the City may make the restoration itself at the cost of Franchisee or have them made at the cost of Franchisee.

**Section 13. Use and/or Development Authorization and Permits.** Franchisee shall obtain use, right-of-way construction, and/or development authorization and required permits from the City and all other appropriate regulatory authorities prior to constructing or installing Facilities or performing other work in a Public Way in accordance with the Burien Municipal Code, including but not limited to Title 12 BMC.

- A. Franchisee shall provide the information for all Facilities that it proposes to construct or install as set forth in BMC 12.18.040.
- B. The requirements of this section do not apply to repair or maintenance of a previously approved overhead facility, provided that the location and size of the previously approved facility is not materially changed, that no additional new Facilities are constructed or installed, that the repair or maintenance activities are conducted in accordance with good

engineering, repair, and maintenance practices and do not interfere with the public use of the Public Ways or adversely affect public health, safety, or welfare, that maintenance or repair activities conform to all federal, state, local, and industry codes, rules, regulations, and standards, and that the repair or maintenance activities comply with the City Code.

- C. Franchisee shall not be granted development authorization or issued permits for construction or installation of new Facilities unless Franchisee is in full compliance with the provisions of this Franchise and all of Franchisee's existing Facilities have been expressly approved by the City in writing.

#### **Section 14. Indemnification and Assumption of Risk.**

##### **A. Indemnification.**

- (1) Franchisee hereby releases, covenants not to bring suit, and agrees to indemnify, defend and hold harmless the City, its elected officials, officers, employees, agents, and representatives against any and all claims, costs, damages, judgments, awards, attorneys' fees or liability, of any kind whatsoever, to any person, including claims by Franchisee's own employees from which Franchisee might otherwise be immune under Title 51 RCW, arising from injury or death of any person or damage to property caused by the acts or omissions of Franchisee, its officers, employees, agents or representatives. (2) Franchisee further releases, covenants not to bring suit and agrees to indemnify, defend and hold harmless the City, its elected officials, officers, employees, agents, and representatives from any and all claims, costs, damages, judgments, awards, attorneys' fees or liability to any person arising out of Franchisee's exercise of the rights, privileges, or authority granted by this Franchise, which are made against the City, in whole or in part, due to the City's ownership or control of the Public Ways or other City property, by virtue of the City permitting the Franchisee's entry, occupancy or use of the Public Ways, or based upon the City's inspection or lack of inspection of work performed by Franchisee, its officers, employees, agents or representatives.
- (3) These indemnification covenants include, but are not limited to, claims against the City arising as a result of the acts or omissions of Franchisee, its officers, employees, agents or representatives in barricading, instituting trench safety systems, or providing inadequate warnings of any excavation, construction, or work in any Public Way or other public place in performance of work or services permitted under this Franchise.
- (4) Franchisee further agrees to indemnify, hold harmless and defend the City, its elected officials, officers, employees, agents, and representatives against any claims for damages, including, but not limited to, business interruption damages and lost profits, brought by or under users of the Franchisee's Facilities as the result of any interruption of service due to damage or destruction of the user's facilities caused by or arising out of damage or destruction of Franchisee's

Facilities, except to the extent any such damage or destruction is caused by or arises from the active sole negligence of the City.

- (5) In the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of Franchisee and the City, Franchisee's liability hereunder shall be only to the extent of Franchisee's negligence.
- (6) It is further specifically and expressly understood that the indemnification covenants provided herein constitute the Franchisee's waiver of immunity under Title 51 RCW. This waiver has been mutually negotiated by the parties.
- (7) Inspection or acceptance by the City of any work performed by Franchisee at the time of completion of construction or installation shall not be grounds for avoidance of any of these indemnification covenants. Said indemnification obligations shall extend to claims that are not reduced to a suit and to any claims that may be compromised prior to the culmination of any litigation or the institution of any litigation.
- (8) In the event that Franchisee refuses the tender of defense in any suit or any claim, said tender having been made pursuant to the indemnification covenants contained herein, and said refusal is subsequently determined by a court having jurisdiction, or such other tribunal that the parties shall agree to decide the matter, to have been a wrongful refusal on the part of Franchisee, then Franchisee shall pay and be responsible for all of the City's costs for defense of the action, including all reasonable expert witness fees and reasonable attorneys' fees and the reasonable costs of the City, including reasonable attorneys' fees of recovering under these indemnification covenants.

**B. Assumption of Risk.**

- (1) Franchisee assumes the risk of damage to its Facilities located in the City's Public Ways from activities conducted by third parties or the City, its elected officials, officers, employees, agents, or representatives. Franchisee releases and waives any and all claims against the City, its elected officials, officers, employees, agents, and representatives for damage to or destruction of the Franchisee's Facilities, except to the extent any such damage or destruction is caused by or arises from the active sole negligence of the City.
- (2) Franchisee bears sole responsibility to insure its property. Franchisee shall ensure that its insurance contracts waive subrogation claims against the City, its elected officials, officers, employees, agents, and representatives, and Franchisee shall indemnify, defend and hold harmless the City, its elected officials, officers, employees, agents, and representatives against any and all subrogation claims if it fails to do so.

**Section 15. Insurance.** Franchisee shall obtain and maintain, at its cost, worker's compensation insurance in accordance with State law requirements and the following liability insurance

policies insuring Franchisee and, as additional insureds, the City, the City's elected officials, employees, agents, representatives, consultants, and volunteers, against claims for injuries to persons or damages to property, which may arise from or in connection with the exercise of the rights, privileges, and authority granted to Franchisee:

- A. Comprehensive general liability insurance, written on an occurrence basis, with limits not less than:
  - (1) \$5,000,000.00 for bodily injury or death to each person;
  - (2) \$5,000,000.00 for property damage resulting from any one accident; and
  - (3) \$5,000,000.00 for umbrella coverage for all other types of liability.
- B. Automobile liability for owned, non-owned and hired vehicles with a limit of \$3,000,000.00 for each person and \$3,000,000 for each accident.
- C. The liability insurance policies required by this section shall be maintained by Franchisee throughout the term of this Franchise, such other periods of time during which Franchisee's Facilities occupy Public Ways, and while Franchisee is engaged in the removal of its Facilities. Franchisee shall provide an insurance certificate, together with an endorsement naming the City, and its elected officials, employees, agents, representatives, consultants, and volunteers as additional insureds, to the City prior to the commencement of any construction or installation of any Facilities pursuant to this Franchise or other work in a Public Way. Any deductibles or self-insured retentions must be declared to and approved by the City. Payment of deductibles and self-insured retentions shall be the sole responsibility of Franchisee. The insurance certificate required by this section shall contain a clause stating that coverage shall apply separately to each insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability. Franchisee's insurance shall be primary insurance with respect to the City, its elected officials, employees, agents, representatives, consultants, and volunteers. Any insurance maintained by the City, its elected officials, employees, agents, representatives, consultants, and volunteers shall be in excess of the Franchisee's insurance and shall not contribute to it.
- D. In addition to the coverage requirements set forth in this section, each such insurance policy shall contain an endorsement in a form which substantially complies with the following:

"It is hereby understood and agreed that this policy may not be canceled nor the intention not to renew be stated until 90 days after receipt by the City, by registered mail, of a written notice addressed to the City Manager of intent to cancel or not to renew."
- E. At least thirty (30) days prior to said cancellation or non-renewal, Franchisee shall obtain

and furnish to the City replacement insurance policies meeting the requirements of this section.

**Section 16. Performance Bond.** Franchisee shall file with the City a performance bond, in the amount of 125% of the Franchisee's estimated cost of work in the Public Way or as otherwise specified by the City, at the time the City grants Franchisee a requested construction or right-of-way use permit. This bond shall be maintained throughout the period of time that Franchisee is performing work under such applicable permit. In the event Franchisee fails to comply with any law, ordinance, or regulation governing the Franchise or the permit, or fails to perform, observe, and fulfill each term, condition and covenant of the Franchise or the permit, there shall be recoverable, jointly and severally from the principal and surety of the bond, any damage or loss suffered by the City.

**Section 17. Security Fund.** In addition to the performance bond specified above, Franchisee shall establish and maintain a security fund in the amount of twenty-five thousand dollars (\$25,000), at its cost, with the City by depositing such monies, letters of credit, or other instruments in such form and amount acceptable to the City within 30 calendar days of the effective date of this Franchise. No sums may be withdrawn from the fund by Franchisee without consent of the City. The security fund shall be maintained at the sole expense of Franchisee so long as any of the Franchisee's Facilities occupy a Public Way.

- A. The fund shall serve as security for the performance of this Franchise, including any claims, costs, damages, judgments, awards, attorneys' fees or liability, of any kind whatsoever that the City pays or incurs, including civil penalties, because of any failure attributable to Franchisee to comply with the provisions of this Franchise or the codes, ordinances, rules, regulations, standards, or permits of the City.
- B. Before any sums are withdrawn from the security fund, the City shall give written notice to Franchisee:
  - (1) Describing the act, default or failure to be remedied, or the claims, costs, damages, judgments, awards, attorneys' fees or liability that the City has incurred or may pay by reason of Franchisee's act or default;
  - (2) Providing a reasonable opportunity for Franchisee to first remedy the existing or ongoing default or failure, if applicable;
  - (3) Providing a reasonable opportunity for Franchisee to pay any monies due the City before the City withdraws the amount thereof from the security fund, if applicable; and
  - (4) Providing Franchisee a reasonable opportunity to review with the City the act, default or failure described in the notice.
- C. Franchisee shall replenish the security fund within fourteen (14) days after written notice from the City that there is a deficiency in the amount of the fund.

- D. Insufficiency of the security fund shall not release or relieve Franchisee of any obligation or financial responsibility under this Franchise or any other applicable legal requirement.

**Section 18. Taxes, Charges, and Fees.**

- A. Franchise Fee. The parties understand that RCW 35.21.860 currently prohibits a municipal franchise fee for permission to use the Right-of-Way for telephone business purposes. Based on the representations of Franchisee, it is the City's understanding that Franchisee will use the right of way for telephone business purposes as defined by RCW 82.16.010. If this statutory prohibition is removed, Franchisee agrees that the City will assess a reasonable franchise fee in accordance with such revised state statute and that this Franchise will be amended accordingly, including the adoption of provisions necessary for the proper administration and payment of such fee.
- B. Administrative Charges and Fees. The parties also understand that RCW 35.21.860 authorizes the City to recover from Franchisee all charges and fees imposed to recover actual administrative expenses incurred by the City that are directly related to: receiving and approving this Franchise and required permits; inspecting plans and construction; and preparing a detailed statement under Ch. 43.21C RCW. Regular application and processing charges and fees imposed by the City shall be deemed to be attributable to actual administrative expenses incurred by the City but shall not excuse Franchisee from paying and being responsible for other actual administrative expenses incurred by the City. Franchisee and the City agree that the following fees are consistent with this provision and shall be paid by Franchisee:
- (1) Franchisee shall pay an initial franchise administration/processing fee of six thousand dollars (\$6,000) within 30 calendar days of the effective date of this Franchise.
  - (2) Franchisee shall pay permit fees and related charges, in accordance with applicable sections of the City Code.
- C. Utility Tax. The parties further understand that RCW 35.21.870 currently limits the rate of City tax upon telephone business activities to six percent (6%) of gross receipts, unless a higher rate is approved by vote of the people. Franchisee agrees that its business activities in the City, which utilize Franchisee's Facilities in City Rights of Way as authorized by this Franchise, shall be subject to said six percent (6%) tax and to the requirements of the City's tax code as set forth in Title 3 BMC, including but not limited to all provisions necessary and applicable to the administration, payment, accounting, reporting, and auditing of the utility tax obligation of Franchisee. If this Franchise terminates for any reason, the Franchisee shall file with the City within ninety (90) calendar days of the date of the termination, a financial statement showing the gross revenues received by the Franchisee since the end of the previous fiscal year. The City reserves the

right to satisfy any remaining financial obligations of the Franchisee to the City by utilizing the funds available in the security fund or performance bond provided by the Franchisee. Franchisee further agrees that nothing in this Franchise shall otherwise limit the City's power of taxation, as it now or hereafter exists.

- D. In addition to penalties and other remedies to which Franchisee may be subjected, the City reserves the right to impose site-specific charges incurred by the City for placement of structures used to provide Telecommunications Services. Unless otherwise agreed by the parties, such charges shall be an amount equal to at least one hundred percent (100%) of the costs incurred by the City.
- E. The fees and taxes set forth in this section shall be in addition to any and all taxes or other levies or assessments which are now or hereafter required to be paid by businesses in general by any law of the City, the State or the United States including, without limitation, sales, use and other taxes, business license fees or other payments. Payment of the fees under this Franchise shall not exempt Franchisee from the payment of any other license fee, permit fee, tax or charge on the business, occupation, property or income of Franchisee that may be lawfully imposed by the City.

#### **Section 19. Additional Ducts, Conduits, and Overhead Facilities.**

- A. As provided in RCW 35.99.070, whenever Franchisee is constructing, relocating, or placing ducts or conduits in the Public Way and whenever the City has made a request for additional ducts or conduits in advance of such installation, Franchisee shall construct and install additional ducts and conduits when and where requested by the City and related structures necessary to access the ducts and conduits, subject to the separate mutual written agreement of the parties to include charges paid by the City for Franchisee's incremental costs. Such ducts and conduits shall be readily accessible and available for governmental use as determined by the City in its reasonable discretion. Such ducts and conduits shall not be used to provide telecommunications or cable service for hire, sale, or resale to the general public and shall be limited to the City's non-commercial, governmental use for the benefit of the general public, unless otherwise agreed by the parties or as otherwise provided in RCW 35.99.070.
- B. As a condition of being allowed to place optical cable, optical cable housing, or splicing connections on existing utility poles as overhead Facilities, whenever the City has made a request for additional overhead facilities in advance of such installation, Franchisee shall construct, install, maintain, and repair additional such overhead facilities when and where requested by the City and related structures necessary to access the facilities, subject to the separate mutual written agreement of the parties to include charges paid by the City for Franchisee's incremental costs. Such additional overhead facilities shall be readily accessible and available for governmental use as determined by the City in its reasonable

discretion. Such additional overhead facilities shall not be used to provide telecommunications or cable service for hire, sale, or resale to the general public and shall be limited to the City's non-commercial, governmental use for the benefit of the general public, unless otherwise agreed by the parties or as otherwise provided in RCW 35.99.070.

**Section 20. Access to Facilities and Universal Service.**

- A. Franchisee shall provide access to its Facilities by hire, sale, or resale on a nondiscriminatory basis. Franchisee shall make its Telecommunications Services available to any customer within its Franchise Area who shall request such service whenever feasible, without discrimination as to the terms, conditions, rates or charges for the Franchisee's Services; provided, however, that nothing in this section shall prohibit Franchisee from making any reasonable classifications among differently situated customers.
- B. Franchisee shall provide Internet access to users of City property, at locations requested by the City, if it is practicable; provided that, Franchisee and the City shall enter into a separate agreement or agreements regarding the allocation of costs to construct, install, operate, maintain, repair, and remove Facilities needed to provide such access; provided, however, that nothing herein shall require the City to accept construction or installation of Facilities on City property.

**Section 21. Acquisition of Facilities.** Upon Franchisee's acquisition of any Facilities in the Public Way, or upon any addition or annexation to the City of any area in which Franchisee has Facilities, such Facilities shall immediately be subject to the terms of this Franchise without further action of the City or Franchisee.

**Section 22. One-Call.** Franchisee is responsible for complying with the provisions of Washington's One-Call statutes.

**Section 23. Vacation of Public Ways.** The City reserves the right to vacate any Public Way that is subject to rights, privileges, and authority granted by this Franchise. If Franchisee has Facilities in such Public Way, the City shall reserve an easement for Franchisee's Facilities or arrive at some other mutually acceptable arrangement for Franchisee's Facilities.

**Section 24. Duty to Provide Information.** Within thirty (30) days of a written request from the City, Franchisee shall furnish the City with all requested information sufficient to document:

- A. That Franchisee has complied with all requirements of this Franchise;

- B. That taxes, fees, charges, or other costs owed or payable by Franchisee have been properly collected and paid;
- C. The names of the users of Franchisee's Facilities, the services and products those users are providing to the public, and the amount of gross revenues Franchisee received from those users during the preceding fiscal year as verified by a certified public accountant retained by Franchisee; and
- D. Franchisee's activities in developing its Facilities during the previous year and Franchisee's planned activities in developing its Facilities during the current and subsequent year.

Franchisee's obligations under this section are in addition to those provided elsewhere in this Franchise and in applicable provisions of the Burien Municipal Code including but not limited to Titles 3 and 12 BMC.

#### **Section 25. Records.**

- A. Franchisee will manage all of its operations in accordance with a policy of keeping its documents and records open and accessible to the City. The City will have access to, and the right to inspect, any documents and records of Franchisee and its affiliates that are reasonably necessary for the enforcement of this Franchise or to verify Franchisee's compliance with terms or conditions of this Franchise. Franchisee will not deny the City access to any of Franchisee's records on the basis that Franchisee's documents or records are under the control of any affiliate or a third party.
- B. All documents and records maintained by Franchisee shall be made available for inspection by the City at reasonable times and intervals; provided, however, that nothing in this section shall be construed to require Franchisee to violate state or federal law regarding subscriber privacy, nor shall this section be construed to require Franchisee to disclose proprietary or confidential information without adequate safeguards for its confidential or proprietary nature.
- C. One copy of documents and records requested by the City will be furnished to the City at the cost of Franchisee. If the requested documents and records are too voluminous or for security reasons cannot be copied or removed, then Franchisee may request, in writing within ten (10) days of the City's request, that the City inspect them at Franchisee's local office. If any documents or records of Franchisee are not kept in a local office and/or are not made available in copies to the City, and if the City determines that an examination of such documents or records is necessary or appropriate for the enforcement of this Franchise or to verify Franchisee's compliance with terms or conditions of this Franchise, then all reasonable travel and related costs incurred in making such examination shall be

paid by Franchisee.

**Section 26. Assignment or Transfer.** Franchisee's rights, privileges, and authority under this Franchise, and ownership or working control of Facilities constructed or installed pursuant to this Franchise, may not, directly or indirectly, be transferred, assigned or disposed of by sale, lease, merger, consolidation or other act of Franchisee, by operation of law or otherwise, except as provided herein, or without the prior written consent of the City, which consent shall not be unreasonably withheld or delayed; provided that, the foregoing shall not be applicable to assignments to Franchisee's affiliates. Any transfer, assignment, or disposal of Franchisee's rights, privileges, and authority under this Franchise, or ownership or working control of Facilities constructed or installed pursuant to this Franchise, may be subject to reasonable conditions as may be prescribed by the City.

- A. No rights, privileges, or authority under this Franchise shall be assigned, transferred, or disposed of in any manner within twelve (12) months after the effective date of this Franchise.
- B. Absent extraordinary and unforeseeable circumstances, no Facilities shall be assigned, transferred, or disposed of before construction of the Facilities has been completed and restoration has been performed to the satisfaction of the City.
- C. Franchisee and the proposed assignee or transferee shall provide and certify the following information to the City not less than one hundred and fifty (150) days prior to the proposed date of assignment, transfer, or disposal:
  - (1) Complete information setting forth the nature, terms and conditions of the proposed assignment, transfer, or disposal;
  - (2) Any other information reasonably required by the City; and
  - (3) A transfer application fee in an amount to be determined by the City to recover actual administrative costs directly related to receiving and approving the proposed assignment, transfer, or disposal.
- D. No assignment, transfer, or disposal may be made or shall be approved unless the assignee or transferee has the legal, technical, financial, and other requisite qualifications to operate, maintain, repair, and remove Facilities constructed or installed pursuant to this Franchise and to comply with the terms and conditions of this Franchise.
- E. Any transfer, assignment, or disposal of rights, privileges, and authority under this Franchise or ownership or working control of Facilities constructed or installed pursuant to this Franchise, without prior written approval of the City pursuant to this section, shall be void and is cause for termination of this Franchise.
- F. Any transactions which singularly or collectively result in a change of fifty percent (50%)

or more of the ownership or working control (regardless of the percentage) of the Franchisee or affiliated entities having fifty percent (50%) or more of the ownership or actual working control (regardless of the percentage) of Franchisee, or of control of the telecommunications capacity or bandwidth of Franchisee, shall be considered an assignment or transfer requiring City approval. Transactions between affiliated entities are exempt from City approval; provided that, Franchisee shall promptly notify the City prior to any proposed change in, or transfer of, or acquisition by any other party of control of Franchisee. Every change, transfer, or acquisition of control of Franchisee shall cause a review of the proposed transfer. City approval shall not be required for mortgaging purposes or if said transfer is from Franchisee to another person controlled by Franchisee.

- G. All terms and conditions of this Franchise shall be binding upon all permitted successors and assigns of Franchisee and all persons who obtain ownership or working control of any facility constructed or installed pursuant to this Franchise.

### **Section 27. Receivership.**

At the option of the City, subject to applicable law, this Franchise may be revoked after the appointment of a receiver or trustee to take over the business of Franchisee whether in a receivership, reorganization, bankruptcy or other action or proceeding, unless:

- A. The receivership or trusteeship is timely vacated; or
- B. The receiver or trustee has timely and fully complied with all the terms and provisions of this Franchise and has remedied all defaults under the Franchise. Additionally, the receiver or trustee shall have executed an agreement duly approved by the court having jurisdiction, by which the receiver or trustee assumes and agrees to be bound by each and every term, provision and limitation of this Franchise.

### **Section 28. Violations, Noncompliance, and Other Grounds for Termination or Cancellation.**

- A. This Franchise, and any right, privilege or authority of Franchisee to enter, occupy or use Public Ways, may be terminated or cancelled by the City for the following reasons:
- (1) Violation of or noncompliance with any term or condition of this Franchise by Franchisee;
  - (2) Violation of or noncompliance with the material terms of any use and/or development authorization or required permit by Franchisee;
  - (3) Construction, installation, operation, maintenance, or repair of Facilities on, in, under, over, across, or within any Public Way without Franchisee first obtaining use and/or development authorization and required permits from the City and all

- other appropriate regulatory authorities;
  - (4) Unauthorized construction, installation, operation, maintenance, or repair of Facilities on City property;
  - (5) Misrepresentation or lack of candor by or on behalf of Franchisee in any application or written or oral statement upon which the City relies in making the decision to grant, review or amend any right, privilege or authority to Franchisee;
  - (6) Abandonment of Facilities;
  - (7) Failure of Franchisee to pay taxes, fees, charges or costs when and as due; or
  - (8) Insolvency or bankruptcy of Franchisee.
- B. In the event that the City believes that grounds exist for termination or cancellation of this Franchise or any right, privilege or authority of Franchisee to enter, occupy or use Public Ways, Franchisee shall be given written notice and a reasonable period of time not exceeding thirty (30) days to furnish evidence:
  - (1) That corrective action has been, or is being actively and expeditiously pursued, to remedy the violation, noncompliance, or other grounds for termination or cancellation;
  - (2) That rebuts the alleged violation, noncompliance, or other grounds for termination or cancellation; or
  - (3) That it would be in the public interest to impose some penalty or sanction less than termination or cancellation.
- C. In the event that Franchisee fails to provide evidence reasonably satisfactory to the City as provided in subsection (B) of this section, the City shall refer the apparent violation, noncompliance, or other grounds for termination or cancellation to the City Council. The City shall provide the Franchisee with notice and a reasonable opportunity to be heard concerning the matter.
- D. If the City Council determines that the violation, noncompliance, or other grounds above for termination or cancellation exist, then, Franchisee shall, at the election of the City Council, forfeit all rights, privileges and authority conferred under this Franchise or any use and/or development authorization or permit granted by the City, and this Franchise and any such use and/or development authorization or permit may be terminated or cancelled by the City Council. The City Council may elect, in lieu of the foregoing and without any prejudice to any of its other legal rights and remedies, to pursue other remedies, including obtaining an order compelling Franchisee into compliance or to take corrective action, or to recover damages and costs incurred by the City by reason of Franchisee's actions or omissions. The City Council shall utilize the following factors in analyzing the nature, circumstances, extent, and gravity of the actions or omissions of Franchisee:
  - (1) Whether the misconduct was egregious;



time or pursuing its rights or remedies.

**Section 31. Eminent Domain.** This Franchise is subject to the power of eminent domain and the right of the City Council to repeal, amend, or modify the Franchise in the interest of the public. In any proceeding under eminent domain, the Franchise itself shall have no value.

**Section 32. Limitation of Liability.** Administration of this Franchise may not be construed to create the basis for any liability on the part of the City, its elected officials, employees, agents, representatives, consultants, or volunteers for injury or damage resulting from: (1) any schedule or specification review, inspection, notice and order, permission, or other approval or consent by the City; (2) any action or inaction authorized or done in connection with the implementation or enforcement of this Franchise by the City; or (3) the inaccuracy of plans submitted to the City.

**Section 33. Damage to Facilities.** Unless directly and proximately caused by the active sole negligence of the City, the City shall not be liable for any damage to or loss of any Facilities as a result of or in connection with any public works, public improvements, construction, excavation, grading, filling, or work of any kind on, in, under, over, across, or within a Public Way done by or on behalf of the City.

**Section 34. Competitive Neutrality.** In order to maintain a level playing field among all similarly situated franchisees of the City, upon the grant or renewal of another franchise in the Rights-of-Way where material terms or conditions of this Franchise conflict with a change in the City Code, or the provisions of this Franchise provide a material competitive advantage over another similarly situated provider such that it negatively impacts the City's ability to effectively manage the Rights-of-Way, then the City may elect to renegotiate with the Franchisee in good faith to modify the terms and provisions of this Franchise to obtain material terms and conditions that, as a whole, are competitively neutral between franchisees.

**Section 35. Governing Law and Venue.** This Franchise and use of the applicable Public Ways will be governed by federal law, the laws of the State of Washington, and local law. Franchisee agrees to be subject to the jurisdiction of the courts of the State of Washington. Any action relating to this Franchise must be brought in the Superior Court of Washington for King County, or in the case of a federal action, the United States District Court for the Western District of Washington, unless an administrative agency has primary jurisdiction.

**Section 36. Severability.** If any section, sentence, clause or phrase of this Franchise or its application to any person or entity should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality will not affect the validity or constitutionality of any other section, sentence, clause or phrase of this Franchise or its application to any other person or entity; provided that, if any term or condition of this Franchise relating to Franchisee's right, privilege, or authority to place optical cable, optical cable housing, and splicing connections on existing utility poles as overhead Facilities is held to be invalid or unconstitutional by a court of competent jurisdiction, Franchisee's authority to construct, install,

operate, maintain, or repair overhead Facilities shall be deemed void *ab initio*, any overhead Facilities shall be deemed to be unauthorized, and Franchisee shall be authorized only to place Facilities underground; and provided further that, as an alternative to the above severability provisions, the parties may negotiate a mutually acceptable amendment of this Franchise as may be necessary and appropriate to meet the requirements of the law and/or to effectuate the intention of this Franchise.

**Section 37. Miscellaneous.**

- A. Equal Employment and Nondiscrimination. Throughout the term of this Franchise, Franchisee will fully comply with all equal employment and nondiscrimination provisions and requirements of federal, state, and local laws, and in particular, FCC rules and regulations relating thereto.
- B. Local Employment Efforts. Franchisee will use reasonable efforts to utilize qualified local contractors, including minority business enterprises and woman business enterprises, whenever the Franchisee employs contractors to perform work under this Franchise.
- C. Descriptive Headings. The headings and titles of the sections and subsections of this Franchise are for reference purposes only and do not affect the meaning or interpretation of the text herein.
- D. Force Majeure. Franchisee shall not be required to perform any covenant or obligation in this Franchise, or be liable in damages to the City, so long as the performance or non-performance of the covenant or obligation is delayed, caused or prevented by an act of God or force majeure. An “act of God” or “force majeure” is defined for purposes of this Franchise as strikes, lockouts, sit-downs, material or labor restrictions by any governmental authority, unusual transportation delays, riots, floods, washouts, explosions, earthquakes, fire, storms, weather (including inclement weather which prevents construction), acts of the public enemy, wars, terrorism, insurrections, and/or any other similar cause not reasonably within the control of Franchisee.
- E. Costs and Attorneys' Fees. If any action or suit arises in connection with this Franchise, the substantially prevailing party will be entitled to recover all of its costs and attorneys' fees, as well as costs and attorneys' fees on appeal, in addition to such other relief as the court may deem proper.
- F. No Joint Venture. Nothing herein will be deemed to create a joint venture or principal-agent relationship between the parties, and neither party is authorized to, nor shall either party, act toward third persons or the public in any manner that would indicate any such relationship with the other.
- G. Actions of the City or Franchisee. In performing their respective obligations under this

Franchise, the City and Franchisee will act in a reasonable, expeditious, and timely manner. Whenever this Franchise sets forth a time for any act to be performed by Franchisee, such time shall be deemed to be of the essence, and any failure of Franchisee to perform within the allotted time may be considered a material breach of this Franchise and sufficient grounds for the City to invoke any relevant remedy.

- H. Counterparts. This Franchise may be executed in one or more counterparts, and each originally executed duplicate counterpart of this Franchise shall be deemed to possess the full force and effect of the original.
- I. Entire Agreement. This Franchise represents the entire understanding and agreement between the parties with respect to the subject matter and supersedes all prior oral and written negotiations between the parties.
- J. Modification. The parties may alter, amend or modify the terms and conditions of this Franchise upon written agreement of both parties to such alteration, amendment or modification.
- K. Non-exclusivity. This Franchise does not confer any exclusive right, privilege, or authority to enter, occupy or use Public Ways for delivery of Telecommunications Services or any other purposes. This Franchise is granted upon the express condition that it will not in any manner prevent the City from granting other or further franchises in, on, across, over, along, under or through any Public Way.
- L. Rights Granted. This Franchise does not convey any right, title or interest in Public Ways but shall be deemed only as authorization to enter, occupy, or use Public Ways for the limited purposes and terms stated in this Franchise. Further, this Franchise shall not be construed as any warranty of title.
- M. Contractors and Subcontractors. Franchisee's contractors and subcontractors must be licensed and bonded in accordance with the City's ordinances, rules, and regulations. Work by contractors and subcontractors is subject to the same restrictions, limitations and conditions as if the work were performed by Franchisee.

**Section 38. Effective Date.** This ordinance shall be published in the official newspaper of the City and shall take effect and be in full force five (5) days after the date of publication.

**Section 39. Acceptance.** Within thirty (30) days after the effective date of this franchise ordinance, Franchisee shall deliver to the City a fully executed, unconditional acceptance of this Franchise in the form attached hereto as Exhibit A. Said acceptance shall be executed by a duly authorized representative of Franchisee, who has full authority to bind Franchisee to the terms of the Franchise. Upon receipt by the City of the Franchisee's acceptance, and the \$6,000 administration/processing fee pursuant to Section 18 and proof of deposit of the \$25,000 security

fund pursuant to Section 17, within said 30 day period, the City shall attach the fully executed acceptance to the franchise ordinance as Exhibit A. If Franchisee fails to provide the acceptance, fee, and security fund within said 30 day period, then Franchisee shall be deemed to have rejected the Franchise and the Franchise shall be voidable at the discretion of the City.

**ADOPTED** BY THE CITY COUNCIL AT A REGULAR MEETING THEREOF ON THE 18th DAY OF MARCH, 2013, AND SIGNED IN AUTHENTICATION OF ITS PASSAGE THIS 18th DAY OF MARCH, 2013.

CITY OF BURIEN

/s/ Brian Bennett, Mayor

ATTEST/AUTHENTICATED:

/s/ Monica Lusk, City Clerk

Approved as to form:

/s/ Craig D. Knutson, City Attorney

Filed with the City Clerk: February 27, 2013

Passed by the City Council: March 18, 2013

Ordinance No. 578

Date of Publication: March 21, 2013

## Exhibit A – Acceptance of Franchise

In accordance with Section 39 of Ordinance No. 578, Franchisee hereby submits this unconditional acceptance of the Franchise granted to Zayo Group, LLC by the City of Burien. Franchisee hereby certifies that the undersigned is a duly authorized officer of Franchisee with the authority to execute unconditional acceptance of this Franchise. Attached herewith are the following documents in accordance with the requirements of the Franchise:

1. \$6,000 administration/processing fee in accordance with Section 18; and
2. Proof of deposit of \$25,000 security fund in accordance with Section 17.

ACCEPTED BY ZAYO GROUP, LLC

Name

Signature

# Title

STATE OF \_\_\_\_\_ )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, personally appeared before me the undersigned, a Notary Public, in and for the State of \_\_\_\_\_, duly commissioned and sworn, \_\_\_\_\_ to me known to be an authorized representative of \_\_\_\_\_, a \_\_\_\_\_ limited liability corporation, that executed the foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of said entity, for the uses and purposes therein mentioned, and on oath stated that said person is authorized to execute the said instrument.

WITNESS MY HAND AND OFFICIAL SEAL hereto affixed the day and year first above written.

(Signature of Notary)

(Legibly Print or Stamp Name of Notary)

Notary public in and for the State of \_\_\_\_\_, residing  
at \_\_\_\_\_

My appointment expires \_\_\_\_\_